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**BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION)
 OF WATER TO WATER RIGHTS NOS.)
 36-07210, 36-07427, AND 36-02356A)
)
Blue Lakes Delivery Call)
)
)
 IN THE MATTER OF DISTRIBUTION)
 OF WATER TO WATER RIGHTS NOS.)
 36-04013A, 36-04013B, and 36-07148)
)
Clear Springs, Snake River Farm)
Delivery Call)
)
)

**IGWA'S PETITION FOR
 RECONSIDERATION AND
 CLARIFICATION OF
 RECOMMENDED ORDER**

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COME NOW, Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively "IGWA"), through counsel, and hereby petition the Hearing Officer for reconsideration and clarification of the *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* filed January 11, 2008, herein (the "Recommended Order"). This Petition requests clarification and greater specificity regarding the findings of facts and reconsideration of certain conclusions of law in the

Recommended Order, particularly those pertaining to the issues of material injury, the level of uncertainty of the Eastern Snake Plain Aquifer Model (“Model”), the applicability and effect of the futile call rule, and reasonableness of appropriation as it relates to the law against monopolization of Idaho’s water resources.¹

ARGUMENT

I. FINDINGS OF FACT.

Idaho Code and the Rules of Procedure of the Idaho Department of Water Resources (“Department”) require that any order that determines legal rights or interests of one or more parties “shall be accompanied by a concise and explicit statement of the underlying facts of the record supporting the findings.” Idaho Code § 67-5248; Procedure Rule 712.01. “Proper and adequate findings of fact are not only mandatory, but highly practical and salutary in the administration of justice.” *Compton v. Gilmore*, 98 Idaho, 190, 193, 560 P.2d 861, 864 (1977), citing *Mora v. Martinez*, 80 N.M. 88, 451 P.2d 992 (1969). The Department has a statutory obligation “to render a reasoned decision [and] to identify facts, as well as inferences drawn from the facts upon the application of its expertise and judgment, which underlie its decision.” *Woodfield v. Bd. of Professional Discipline*, 127 Idaho 738, 905 P.2d 1047 (Ct. App. 1995). “Such an explanation is essential to meaningful judicial review, and it is a logical adjunct to the agency’s statutory duty to supplement its decision with findings of fact and conclusions of law.” *Id.*

In *Woodfield*, the Idaho Court of Appeals vacated in part an administrative decision by the Idaho State Board of Medicine because “neither the hearing officer nor the Board made any

¹ IGWA believes that the order must contain detailed findings of fact pertaining to all issues raised in the case. While IGWA’s Petition focuses upon specific issues, IGWA does not waive its right to appeal decisions on any of the issues which is reserved.

factual findings describing the ‘poor surgical technique’ which fell below the community standard of care. We think these basic findings are required and we do not believe that a reviewing court can supply the findings simply by saying the board’s factual allegations could be supported by the evidence” *Id.* at 754. The Court concluded that “the Board is required to render a reasoned decision which includes findings based on facts in evidence to allow for meaningful review of the application of those facts to the law.” *Id.* at 756. Upon review, any “determination being unsupported by findings of fact will be set aside.” *Mills v. Holliday*, 94 Idaho 17, 480 P.2d 611 (1971).

The 2005 Curtailment Orders were issued on an emergency basis without a prior hearing, a fully established record or the participation of the affected parties. The recent hearing is an after-the-fact creation of a completed and detailed record upon which subsequent orders must be based. Thus, the findings of fact and conclusions of law in the 2005 Curtailment Orders must be accepted, rejected or modified, in full or in part, consistent with all of the evidence placed into the record. Accordingly, due process demands that the Recommended Order be based “exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.” Idaho Code § 67-5248. While not entirely clear, the Recommended Order implicitly accepts the findings and conclusions made on an emergency basis. The Recommended Order needs to be clarified to reflect acceptance, rejection and/or modification of the findings and conclusions in the 2005 Order and ideally contain such fresh findings and conclusions grounded exclusively in the completed record.

The Recommended Order contains a general discussion of the facts and provides a reasoned analysis of the law, but lacks detailed findings and delineation of all of the facts found by the Hearing Officer to be established together with an application of these detailed facts to the

law.² In order to facilitate proper review of the Recommended Order by the Director and reviewing courts, IGWA respectfully requests that the Recommended Order be further supported by detailed findings of fact and inferences underlying the decision. It may well be appropriate for the Hearing Officer not to venture into some of the ultimate conclusions and policy issues that arguably might best be left to the sound discretion and technical expertise of the Director. Notwithstanding, the Recommended Order should weigh the evidence and provide sufficient findings for the Director to do his work.

IGWA requests particular reconsideration and clarification of the facts and inferences underlying the Hearing Officer's conclusions pertaining to material injury, Model uncertainty, the futile call rule, and the law of reasonable use as embodied in the rule against monopolization of Idaho's water resources.³ The modeled results of the Spring Users proposed curtailment of groundwater users are most significant to each of these issues as summarized in Exhibits 462 and 463. A copy of these exhibits is attached and warrant careful study. These exhibits along with Dr. Wylie's testimony show that the resulting benefits of curtailment are minimal in quantity and significantly time delayed.

² IGWA recognizes the heavy task of analyzing the immense record in this case and appreciates the expedited manner in which the Recommended Order was issued, particularly given the limited time schedule before the Surface Water Coalition Delivery call case commenced February 16th, 2008. This Petition should be viewed simply as a prudent request in conformance with Idaho law for thorough delineation of the established findings of fact and an explanation of issues likely to be subjected to appeal, while recognizing the importance and significant effort in rendering a prompt decision given the constraints imposed by the Surface Water Coalition delivery case hearing coming on January 16, 2008.

³ Because a transcript of the hearing has not yet been completed, citations to the transcript could not be provided in this Petition. IGWA will provide supplemental briefing with citations to the record once the transcript has become available to further assist the Hearing Officer. Both before the hearing commenced and shortly after it concluded IGWA provided the Hearing Officer with detailed and extensive proposed Findings of Fact and Conclusions of law to assist in this process.

II. MATERIAL INJURY.

The Recommended Order points out that the Spring Users delivery call failed to allege material injury under oath as is required by law, but concluded that this defect was cured by testimony at the hearing, stating, “There is now considerable sworn testimony as to the basis for the claims of material injury.” (Recommended Order at 9-10.) The basis for finding material injury cited by the Recommended Order is that “spring flows have declined over time and that a portion of that decline is attributable to ground water pumping,” and that “[t]he Spring Users have been prevented from applying water that would otherwise be available to them for beneficial use, causing them material injury.” *Id.* at 25. The Recommended Order does not find actual injury suffered by the Spring Users; rather, the Order simply equates shortage with material injury, as if they are one and the same. They are not.

A right to use Idaho’s water resources is contingent upon its being put to beneficial use. Consequently, Idaho law permits curtailment only where the senior is suffering “material injury,” defined as: “Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42.” IDAPA 37.03.11.10.14 (emphasis added). There is no “material injury” without demonstration that the water is actually needed to serve the beneficial use. A farmer has no right to demand water for the irrigation of uncultivated lands. Likewise, an aquaculture user has no right to demand water that is not needed to raise fish. It is not enough to be capable of diverting water; the senior must actually need the water to achieve the designated beneficial use.

Due entirely to the Spring Users own refusal to produce financial and production records and documents and any expert testimony or other evidence regarding material injury or how more water could be utilized, the record is entirely void of any evidence to support any finding of

decreased yields or that more water equals more fish, bigger fish or healthier fish. Mere allegations that more water would in fact be put to beneficial use if available does not meet the Spring Users' burden of proof. Based on the record established, the Spring Users failed to present any credible evidence that more water would be put to beneficial use, i.e. that more water would equate to more fish, bigger fish or healthier fish. In the absence of such evidence, a finding of material injury is not supportable.

Therefore, IGWA respectfully requests that the Hearing Officer reconsider and clarify the Recommended Order by providing detailed findings of facts concerning material injury. Based thereon, it is further requested that the Hearing Officer conclude that the Springs Users have not suffered material injury and that the Spring Users' call must be denied.

III. MODEL UNCERTAINTY.

The established record unequivocally confirms that the 2005 Curtailment Orders fail to adequately account for actual Model uncertainty. As pointed out in the Recommended Order, "There are limitations in the use of the model." (Recommended Order at 13.) The Order specifically cites limitations attributable to non-uniform geology of the Eastern Snake Plain Aquifer (the "Aquifer"), variations within the Model cells, inability of the Model to predict the effect of ground water curtailment on a particular spring, and measuring gauge error. *Id.* Each limitation contributes some degree of uncertainty to Model simulations. While the Recommended Order concludes that such limitations do not preclude the Director's use of the Model in administering hydraulically-connected surface and ground water rights, such limitations "are identifiable and important" and must be factored into Model simulations when used as the basis for curtailment. (Recommended Order at 13.)

Of the aforementioned Model limitations, Director Dreher accounted for only one—stream gauge error—in assigning a 10 percent uncertainty factor to the Model.⁴ Based upon this 10 percent uncertainty, the 2005 Curtailment Orders incorporate a “trim line” that extends curtailment to all junior-priority ground water rights in which the Model predicts an eventual return to the Snake River of 10 percent or more of the amount curtailed. The 2005 Curtailment Orders do not account for Model uncertainty attributable to non-uniform geology of the Aquifer, variations within the Model cells, recharge gains and losses, or the fact that the Model is incapable of predicting that curtailed ground water will actually show up at a particular spring—alone a significant source of uncertainty.

At the hearing, all experts—including Dr. Brockway for Clear Springs and Dr. Wylie for the Department—affirmed that Model uncertainty does not result from stream gauge error alone, but must also account for the additional limitations listed above, each of which necessarily increases the degree of uncertainty inherent in Model simulations. Director Dreher agreed that 10 percent is the *minimum degree of uncertainty possible*, and that the actual margin of uncertainty is likely higher. Dr. Brendecke, who participated in developing the Model, testified that the Model simulations should accurately be assigned an uncertainty factor of between at least 20-30 percent, but not as high as 50 percent, and that the level of predictive uncertainty will generally be higher the more localized and specific a prediction is attempted. Dr. Brendecke’s compelling testimony was unchallenged by the Spring Users, IDWR, or anyone else.

The Recommended Order concludes that, “Until a better factor is established, the Director in his best judgment may use 10%.” (Recommended Order at 13.) Yet this is directly

⁴ Director Dreher testified that he assigned 10 percent uncertainty to the Model based upon the 10 percent margin of error existing in relevant stream gauges in the Snake River.

contradicted by the weight of the evidence. Instead, the Recommended Order appears to default to the 2005 Curtailment Orders and the Director's initial assignment of 10 percent uncertainty. Such deference is not warranted. Some clear direction on this important issue is appropriate since the Director did not have the benefit of the voluminous expert testimony and other evidence presented at the recent hearing when he implemented the 10 percent trim line on an emergency basis in 2005.

The percentage of uncertainty in the Model dictates the size of the trim line used to calculate the extent of the potential curtailment. This is discussed more fully below in Section V of this memorandum. As the Model uncertainties increase, the trim line constricts, thereby reasonably decreasing the extent of the curtailment.

IGWA respectfully requests that the Hearing Officer reconsider the issue of Model uncertainty and render a "concise and explicit statement of the underlying facts of the record supporting the findings." Idaho Code § 67-5248; Procedure Rule 712.01. Based thereon, it is further requested that the Hearing Officer conclude that the Director arbitrarily applied a 10% Model uncertainty in contradiction of the undisputed evidence presented at the hearing, establish an appropriate factor to be utilized to address model uncertainty until a scientific evaluation of the same has been completed, or direct the Director to do so in the final Order.

IV. FUTILE CALL.

The Recommended Order concludes that the Spring Users' delivery calls are not futile, reasoning that "in the administration of ground water to spring flows the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks." (Recommended Order at 20.)

A “futile call” is “[a] delivery call made by the holder of a senior-priority surface or ground water right that, for physical or hydrologic reasons, cannot be satisfied within a reasonable time of the call or that would result in waste of the water resource.” CM Rule 10.08; *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1223 (1976); *Neil v. Hyde*, 32 Idaho 576, 586, 186 P. 710 (1920); *Jackson v. Cowan*, 33 Idaho 525, 528, 196 P. 216 (1921).

The Recommended Order does not adequately explain or identify a specific period of time within which some specific portion of the curtailed water must be realized. The facts of this case beg for a finding of futile call. If this case does not present a basis for determining a futile call, none could ever be found under the definition contained in the CM Rules which would be rendered without a purpose. If futile call cannot exist under the facts of this case, the Recommended Order should identify such facts and apply them to the definition of futile call. The Recommended Order also needs to address when and why the extreme amount of waste resulting from the ordered curtailment does or does not amount to a futile call.

There are two separate and distinct factual bases upon which a delivery call may be deemed futile in this conjunctive management proceeding. First, a delivery call is futile if the curtailed water will not be made available for use by the senior right-holder within a reasonable time. CM Rule 10.08. Second, a delivery call is futile if it will result in unreasonable waste of the resource. *Id.* Both aspects of the futile call rule are grounded in policies of reasonable use,

optimum beneficial use, and full economic development of Idaho's ground water resources.⁵ If a futile call did not apply in the distribution of water between surface and ground water rights, then including a definition of futile call in the conjunctive management rules would be unnecessary. However, quite obviously the Department's CM Rules intended that the futile call doctrine would apply in the conjunctive management context under certain factual circumstances

The Recommended Order addresses the timeliness aspect of the futile call rule under the heading "The Futile Call Rule." (Recommended Order at 19-20.) However, the issue of waste is not addressed in that section. Rather, the Order only mentions waste as one justification for the use of a trim line. *Id.* at 22-23. As set forth in the case law cited above, the issue of waste must be considered with regard to the futile call doctrine. As a result, this Petition addresses it herein as a futile call issue. IGWA requests reconsideration of both the timeliness and waste aspects of the futile call rule as follows.

A. A Reasonable Response Time.

The Recommended Order concludes that "in the administration of ground water to spring flows the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks." (Recommended Order at 20.) In support of that

⁵ Policies of reasonable use, optimum beneficial use, and full economic development are well-established in Idaho case law and rooted in the Constitution and State Code: Idaho Const. Art. 15 § 1 ("All use of waters ... is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law."); Idaho Code § 42-234 ("It is the policy of the state of Idaho to promote and encourage the optimum development ... of the water resources of this state."); Idaho Code § 42-226 ("while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources."); *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973); *American Falls Reservoir District No. 2, et al. v. Idaho Department of Water Resources, et al.* ("AFRD2"), 143 Idaho 862, 154 P.3d 433, 447 (2007).

conclusion, the Recommended Order reasons that fish propagation is a year-round venture and that, “If the time for the delivery of water to avoid a futile call defense that is applicable in surface to surface water deliveries were applied in calls for the curtailment of ground water, most calls would be futile.” *Id.* As mentioned *supra*, the Order fails to explain the time required for the results of the subject curtailment to be fully realized, and does not explain why such delay does not make the Spring Users’ delivery calls futile.

That the curtailment of ground water pumping does not provide an immediate response to spring flows does not eliminate the purpose for the futile call doctrine or its applicability in the administration of hydraulically connected surface and ground water rights. Given the policy of achieving optimum beneficial use of Idaho’s finite water resources, Idaho law permits involuntary curtailment of water use only where it will in fact “supply the prior rights of others in such stream or water supply.” Idaho Code § 42-607. The law does not tolerate curtailment without reasonable certainty that the senior right-holder will benefit from the curtailment. The futile call rule gives the law effect by precluding curtailment where the results would be delayed such that there is a substantial possibility that there will be no significant contribution to the senior right.

The longer it takes for the results of curtailment to be realized, the more speculative the benefit, if any, to the calling water right. That is particularly true in this case where the results of curtailment will take decades to be substantially realized and more than 100 years to be fully realized. A multitude of economic market and other factors create uncertainty and speculation regarding whether some minute and undermined amount of curtailed water arriving at the springs can be put to beneficial use. Clear Springs’ CEO Larry Cope and Blue Lakes’ Vice President Gregory Kaslo testified that the aquaculture industry is highly regulated and highly competitive,

and that domestic production is experiencing increasing competition from imported fish production that has cost advantages in the form of less environmental restraints and cheap labor. In fact, Mr. Cope testified that the market experienced a 10% decline in 2002 which left Clear Springs with excess capacity (i.e. excess water), that the market is extremely competitive, and that Asian production is a threat to future competitiveness and viability.

The futile call rule and its foundational laws of optimum beneficial use and full economic development of Idaho's ground water resources demand reasonable certainty that the results of curtailment will actually benefit the calling water right holder by the time water shows up, lest the State and the curtailed water right owner be unnecessarily deprived of valuable water use for naught. Dr. Wylie testified at the hearing that the results of curtailment will not be substantially realized for 50 years and will not be fully realized for more than 100 years. The modeled results of curtailment and purported benefit to the Spring Users is shown in Exhibits 462 and 463 presented through Dr. Wylie, copies of which are attached.

It is undeniably speculative to assume that the aquaculture market and the Spring Users' business practices will remain unchanged for ten or more years, that future technology won't affect demand, and that the benefit of curtailment initially hoped for will not be nullified by climactic changes or other variables. In fact, Clear Springs' CEO Larry Cope testified that a reasonable curtailment benefit would be two-thirds (2/3) of the amount curtailed realized within 30 years. (Citation to be provided when transcript is available).

It is IGWA's contention that it is unduly speculative and arbitrary to curtail ground water rights unless a specific amount of the curtailed water will be received and applied to beneficial use by the senior right holder within a specific time. Without eliminating the important role of priority, pragmatic administration of Idaho's finite water resources commands a reasoned limit

on the length of delay permissible for the results of curtailment to be realized. The futile call rule exists to establish this limitation which requires factual findings be applied to the definition in the rules.

While the Recommended Order recognizes that “[a] reasonable time for the results of curtailment to be fully realized may require years, not days or weeks,” the Order fails to identify or explain what constitutes a reasonable response time or reasonable quantity. The Director and reviewing courts are unable to conduct a meaningful review of the Recommended Order without an explanation of the parameters of the futile call rule and detailed findings of facts underlying the Hearing Officer’s conclusion that the Spring Users’ delivery calls are not futile. It is respectfully requested that the Hearing Officer make very specific findings of fact on these issues. Based thereon, it is further requested that the Hearing Officer conclude that the Director unlawfully threatened curtailment of ground water users when the water derived from such curtailments would not benefit the Spring Users for decades if not a century later. The time and quantity parameters established by the facts of this case must be applied to the definition of futile call.

B. Waste of the Resource.

The futile call doctrine also proscribes unreasonable waste of Idaho’s finite water resources. CM Rule 10.08. “The policy of the law of this state is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960); *Colthrop v. Mountain Home Irrigation District*, 66 Idaho 173, 180 (1945) (citing *State v. Twin Falls Canal Co.*, 21 Idaho 410, 411 (1911)). The Recommended Order cites to waste as one justification for the trim line adopted in the 2005 Curtailment Orders:

One of the most startling facts in these cases is the amount of acreage that must be curtailed in order to deliver water to the Spring Users facilities. It is not a one cfs

block full economic development of underground water resources,” reason dictates that a much lesser degree of waste is tolerated in the present case as necessary to achieve optimum beneficial use and full economic development of the Aquifer. The Blue Lakes Order calls for the permanent curtailment of 57,220 irrigated acres. (Blue Lakes Order at ¶ 77.) The Model predicts that such curtailment will result in an average gain of only 51 cubic feet per second (cfs) to the Devil’s Washbowl to the Buhl Gauge reach of the Snake River at steady state conditions. *Id.* Of that, only 10.05 cfs is projected to show up at Blue Lakes. Dr. Wylie testified that the projected amount to show up at the actual spring outlet for both Blue Lakes and Snake River Farms is not technically defensible, although a percentage of the reach gain was assigned in an attempt to quantify a benefit to the particular spring source which the model is incapable of doing.⁶

- Q. Would you agree that based upon your previous testimony regarding preferential pathways that are present in the aquifer, that not all of those springs that you identified in the Buhl to Thousand Springs reach would react in a similar manner?
- A. Wouldn't react in a similar manner.
- Q. Okay. And so would you then agree that -- that a linear analysis that is looking at the proportional increases between each spring is problematic?
- A. It's not a rigorous analysis; that's correct.
- Q. And by rigorous can you explain what you mean? I guess I'll say, is it one that you think you could defend?
- A. No.

Draft Transcript p. 190: 9-22

Based on a diversion rate of 4 acre-feet per acre, the curtailment of 57,220 acres eliminates ground water diversions of 228,880 acre-feet annually. The estimated gain to Blue

⁶ Because the Model is incapable of predicting the amount of water that will accrue to a specific spring in response to curtailment, Dr. Wylie prepared a linear analysis that essentially apportioned reach gains to various springs. Dr. Wyle estimated that Alpheus Creek receives 19.7% of the reach gains in the Devil’s Washbowl to the Buhl Gauge reach of the Snake River, or 10.05 cfs of the total 51 cfs. (Blue Lakes Order at ¶ 15; Wylie testimony.)

Lakes of 10.05 cfs amounts to a mere **3.2% of the total amount curtailed**. Thus, **96.8% of the quantity curtailed would be wasted** because it would not go to Clear Springs. These numbers were not disputed at the hearing. Furthermore, the 57,220 acres will be dried up immediately while the projected result of curtailment will take decades to substantially accrue and will not be fully realized steady state conditions which occur after more than 100 years.

The Clear Springs Order likewise demands a massive curtailment in an attempt to provide Clear Springs with a minute fraction of the quantity curtailed. The Clear Springs Curtailment Order commands the permanent curtailment of ground water irrigation of 52,470 irrigated acres. (Clear Springs Order at ¶ 71.) The Model predicts that such curtailment will result in an average of 38 cfs to the Buhl Gauge to Thousand Springs reach of the Snake River at steady state conditions. *Id.* Of that, 2.62 cfs are expected to show up at Clear Springs (Snake River Farm).⁷ Based on a typical diversion rate of 4 acre-feet per acre, the curtailment of 52,470 acres eliminates ground water diversions of 209,880 acre feet annually. The estimated water accrual to Snake River Farm of 2.62 cfs amounts to a mere **0.9 % of the amount curtailed**. The remaining **99.1 % is effectively wasted**. These numbers were not disputed at the hearing. Additionally, while the 52,470 acres will be dried up immediately, the projected result of curtailment will take decades to substantially accrue and will not be fully realized for the more than 100 years it takes to reach steady state.

It is inconceivable that the Spring Users' delivery calls (which are only predicted to ultimately provide a mere 3.2% to Blue Lakes and 0.9% to Clear Springs of the total amount of water curtailed to seniors after a period of decades if not a century) are not unreasonably

⁷ The Recommended Order finds that Snake River Farm (i.e. Clear Lakes) receives 6.9% of reach gains in the Buhl to Thousand Springs reach, or 2.62 cfs of the total 38 cfs expected to accrue to the reach in response to the curtailment of 52,470 irrigated acres.

wasteful in violation of the futile call rule and its underlying policies of optimum beneficial use and full economic development of the Aquifer. The Springs Users advocate no trim line and unlimited curtailment of the entire aquifer without regard to waste and unless and until they received their full authorized quantity as if it were a guaranteed amount. On the other hand, the ground water users advocate no curtailment or at most a significantly smaller curtailment area limited to those geographic areas that will provide a significant response within a short time. Given the disputed evidence presented, critical analysis and weighing of the facts presented on each issue followed by application of the defined futile call doctrine is necessary. Should the Hearing Officer be inclined not to venture into the application of the futile call doctrine, at a minimum the factual findings should be presented with clear direction for the Director to make such a determination. Only then can the Director and any subsequent reviewing court be able to conduct a meaningful review of whether the Spring Users' delivery calls are unreasonably wasteful.

Based on the forgoing, it is respectfully requested that the Hearing Office make specific and detailed findings of fact concerning the results of curtailment of ground water users and the accruals to the Spring Users. The Hearing Officer should then apply those facts and either apply the futile call doctrine or direct the Director to do so in the exercise of his sound discretion.

IV. REASONABLE USE.

Under Idaho law, "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water..." CM Rule 20.03. As with the futile call rule, the policy against monopolization of Idaho's water resources is grounded in the principles of

reasonable use, optimum beneficial use, and full economic development of Idaho's ground water resources. The Recommended Order cites monopolization as one justification for a trim line:

This is the extreme case in which the requested curtailment would dry up as much as 600,000 acres, or more if an effort were made to supply the full amount of adjudicated rights every day of the year for a speculative benefit. At that point the Director has a responsibility to the State to consider the impact of the requested curtailment.

This is not a case of saying crop farmers are more important than fish farmers. It is the case where two businesses cannot "command the entirety of large volumes of water in a surface or ground water source to support [their] appropriation[s] contrary to the public policy of reasonable use of water as described in this rule.

(Recommended Order at 24.) The Order explains that the curtailment of 600,000 acres for a speculative benefit is an unreasonable monopolization of the Aquifer, but does not explain why the curtailment of 57,220 acres or 52,420 acres for a speculative benefit is likewise not an unreasonable monopolization of the Aquifer.

The law against monopolization or "hording" of Idaho's water resources is separate and distinct from the policies against waste and speculative curtailment, but is likewise grounded in principles of reasonable use and optimum beneficial use of water. It gives effect to the law in Idaho that "[a]ll waters of the state ... are declared to be the property of the state," Idaho Code § 42-101, that the State has responsibility to control the allocation of water and "in providing for its use shall equally guard all the various interests involved," Idaho Code § 42-101, and that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." Idaho Code § 42-226.

Because the water resources of this state are dedicated to public use, the right of appropriation "is not an unrestricted right, but must be exercised with some regard to the rights of the public." *Schodde*, 224 U.S. at 120. It was the threat of monopolization that the United

States Supreme Court found unreasonable in *Schodde*, declaring that a water right “must be exercised with reference to the general condition of the country and the necessities of the people, and not to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.” *Id.* (quoting *Basey v. Gallagher*, 87 U.S. 670, 683 (1874)). The Idaho Supreme Court recently confirmed that “the reasonableness of use and full economic development” are essential to the lawful administration of Idaho’s water resources. *American Falls Reservoir District No. 2, et al. v. The Idaho Department of Water Resources, et al.* (“AFRD2”), 143 Idaho 862, 876, 154 P.3d 433, 447 (2007).

The curtailment of 57,220 acres and 52,420 acres grants Clear Springs and Blue Lakes an unreasonable monopoly over a large portion of the Aquifer. Such monopolization is compounded by the fact that they are expected to receive only a minute fraction of the amount curtailed, which even then will not be fully realized for more than 100 years. Further, the ordered curtailment permanently dries up tens of thousands of irrigated acres in an effort to pad Clear Springs’ and Blue Lakes’ already enormous appropriations for aquaculture purposes. Blue Lakes controls water rights totaling 715.6 cfs for aquaculture purposes, of which the Blue Lakes is short only 35.25 cfs, or **4.9% of their total**.⁸ (Blue Lakes Order at ¶ 61.) Clear Springs controls even more water for aquaculture, totaling 1,004.27 cfs, of which the Clear Springs is short only 24.5 cfs, or **1% of their total**.⁹ (Clear Springs Order at ¶ 60.) Blue Lakes and Clear Springs already control huge amounts of water, nearly all of which (95.1% for Blue Lakes and 99.1% for Clear Springs) is still available for their use. As above indicated, no evidence was presented that either operations are suffering material injury. The proposed curtailment

⁸ See IGWA’s Supplemental Proposed Findings of Fact Nos. F8-F14.

⁹ See IGWA’s Supplemental Proposed Findings of Fact Nos. F15-F20.

effectively commands maintaining the Aquifer at an artificially high level no longer achievable due to changed irrigation practices for the exclusive benefit of a few water rights in the Thousand Springs region which are supplied by overflow from the Aquifer. Such management necessarily would require that the Aquifer be raised to former peak levels no longer achievable absent the elimination of sprinkler irrigation and return to inefficient irrigation practices. This is not only impossible but unnecessary given the fact that the aquifer is at or near equilibrium and providing a sustainable quantity for all users at existing use patterns.

The unreasonableness of the Spring Users' monopolization of the Aquifer is manifest by the gross economic damage to the State. The effect of curtailment "would result in an immediate and largely permanent net loss of nearly 3,500 jobs, at least \$160 million near term decrease in the area's personal annual income, and a loss of between \$4.4 to \$7 million in annual local property tax revenues." (*Church Direct* at 6.) The residual impacts of curtailment would be extensive and severe. For example, dairies require water for their cows, for the irrigation of crops to provide feed to their cows, and also to manage their waste management plans which require irrigated crops to absorb nutrients from manure spread upon crop land. The lack of water for any of these functions could result in shutdown of the entire dairy operation. (Brockway testimony.) In total, the curtailment would "cause the state's economy to lose a present value of close to \$8.1 billion in gross output during the next twenty years to gain a present value of \$423.5 million." (*Church Direct* at 7.)

Neither a 4.3% nor a 1% shortage to the Spring Users' aquaculture facilities warrants the permanent curtailment of tens of thousands of irrigated acres, particularly when no material injury has been shown. "[W]hen private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize

that the ultimate goal is promotion of the welfare of all our citizens.” *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). Such circumstances may have the effect of “compelling a surface user to convert his point of diversion to a ground water source” if necessary to procure a more useful or reliable water supply. *AFRD#2*, 154 P.3d at 441. Idaho law does not permit an appropriation to deprive the public from using a large quantity of water in order to support a fraction of that quantity to which the appropriator is entitled. *Schodde v. Twin Falls Water Co.*, 224 U.S. 107, 120 (1911).

The resulting permanent curtailment would also have the effect of maintaining a massive surplus of storage water that could not be put to beneficial use contrary to Article 15, Section 3 of the Idaho Constitution. The policy of optimum beneficial use favors the maximum utilization of the ESPA without “mining” the ESPA. Because the ESPA is at or near equilibrium, the policy of optimum beneficial use supports continuation of current ground water diversions. The Spring Users’ delivery calls and resulting permanent curtailment of ground water pumping unreasonably interferes with optimum beneficial use of the ESPA.

IGWA respectfully requests that the Hearing Officer reconsider the issue of monopolization of the Aquifer and render a “concise and explicit statement of the underlying facts of the record supporting the findings.” Idaho Code § 67-5248; Procedure Rule 712.01. It is further requested that the Hearing Officer explain what factual circumstances must exist before the Spring Users’ call is considered unreasonable when their call effectively monopolizes the Aquifer in violation of the policy of optimum beneficial use of the State’s groundwater resources.

V. TRIM LINE.

The use, size and location of a trim line to establish reasonable limitations on curtailment can be determined and/or impacted by determinations made on the issues raised concerning Model uncertainty, futile call and monopolization of the Aquifer. Each can result in a limitation or expansion of the curtailment area. Furthermore, the trim line cannot circumscribe more ground water users than are permitted by any one limitation. For example, if a reasonable response time is 5 years, the trim line cannot permissibly circumscribe ground water diversions for which the results will not be fully realized for more than 5 years. Likewise, if a reasonable amount of waste is limited to 30% or less, the trim line cannot permissibly circumscribe ground water diversions for which less than 70% of the quantity curtailed is not expected to benefit the calling senior.

The Recommended Order suggests that the elevation contour map developed and presented by Clear Springs' expert witness Eric Harmon (Exhibit 314 at page 19) could potentially be used as a further aid to focus and define the curtailment area to one that would likely provide a reasonable response to the Spring Users outlet sources. That map identifies a geographic area of the Aquifer approximately 2-3 miles wide and 20 miles long, located generally north and east of Clear Springs' Snake River Farm facility, that can be expected to provide reasonable contribution to spring discharges. The geographic area identified in Dr. Harmon's contour map is considerably smaller than the 10% trim line implemented in the 2005 Curtailment Orders and could potentially be used as an independent basis to identify geographic areas that are primary contributors to certain reaches of the Snake River. There was no evidence presented to support a larger area than that. Notwithstanding, an even smaller curtailment area would likely be required based upon the uncertainties mentioned above.

Because the Director did not factor in all areas of model uncertainty and did not have the benefit of the evidence presented at the hearing regarding the location of the trim line, appropriate findings of fact should be made on this issue at this time. Based there on it is appropriate for the Hearing Officer to establish a trim line or provide guidance and direction to the Director to do so.

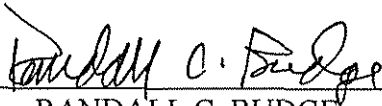
CONCLUSION

Presumably as a result of time constraints and an the importance of rendering an early decision, the Recommended Order contains a general discussion of the facts and provides an analysis of the law, but lacks detailed findings and delineation of all of the facts found by the Hearing Officer to be established together with an application of these detailed facts to the law. In order to facilitate the Director's proper evaluation of the Recommended Order and entry of final findings of fact and conclusions of law as well as subsequent court review, IGWA respectfully requests that the Recommended Order be further supported by detailed findings of fact and inferences underlying the decision. While these should give consideration to the evidence, findings and conclusions in the Director's 2005 Orders entered on an emergency basis it should be clarified which of those findings are accepted, rejected or modified as well as fresh findings and conclusions based on weighing the extensive evidence presented at the hearing.

IGWA requests particular reconsideration and clarification of the facts and inferences pertaining to material injury, Model uncertainty, the futile call rule, and the law of reasonable use and rule against monopolization. Should the Hearing Officer choose not to venture into the realm of the conclusions that may well best be reserved to the exercise of the Director's sound discretion, technical expertise and policy matter, then such direction should be given to the Director with detailed findings of fact upon which to base his ultimate decisions.

DATED this 25th day of January 2008,

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By 
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January, 2008, the above and foregoing document was served in the following manner:

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EXHIBIT 462

Attachment to IGWA's PETITION FOR RECONSIDERATION AND CLARIFICATION OF RECOMMENDED ORDER

**Gain to Devil's Washbowl-Buhl Subreach from ESPA-wide Curtailment
in cubic feet per second**

	Curtailment Date				
	1870	1949	1961	1973	1985
Total Acres Curtailed	1,102,000	989,700	664,300	372,000	74,200
Transient Subreach Gain (cfs)					
After 1 year	51	49	36	22	3
After 5 years	108	97	65	39	6
After 10 years	154	134	88	51	9
After 50 years	261	224	141	79	15
After 100 years	286	247	154	85	17
Steady State Subreach Gain (cfs)	298	257	160	88	18

Projected Gain to Blue Lakes Spring (cubic feet per second)

	Curtailment Date				
	1870	1949	1961	1973	1985
Total Acres Curtailed	1,102,000	989,700	664,300	372,000	74,200
Transient Spring Gain (cfs)					
After 1 year	10	10	7	4	1
After 5 years	22	19	13	8	1
After 10 years	31	27	18	10	2
After 50 years	52	45	28	16	3
After 100 years	57	49	31	17	3
Steady State Spring Gain (cfs)	60	51	32	18	4

EXHIBIT 463

Attachment to IGWA's PETITION FOR RECONSIDERATION AND CLARIFICATION OF RECOMMENDED ORDER

Clear Springs Snake River Farm

Exhibit 463

**Gain to Buhl-Thousand Springs Subreach from ESPA-wide Curtailment
in cubic feet per second**

	Curtailment Date				
	1870	1949	1961	1973	1985
Total Acres Curtailed	1,102,000	989,700	664,300	372,000	74,200
Transient Subreach Gain (cfs)					
After 1 year	47	46	35	22	3
After 5 years	67	63	46	28	4
After 10 years	84	77	54	33	5
After 50 years	124	110	74	43	7
After 100 years	133	118	79	46	8
Steady State Subreach Gain (cfs)	137	122	81	47	8

Projected Gain to Snake River Farm (cubic feet per second)

	Curtailment Date				
	1870	1949	1961	1973	1985
Total Acres Curtailed	1,102,000	989,700	664,300	372,000	74,200
Transient Spring Gain (cfs)					
After 1 year	3	3	2	2	0
After 5 years	5	4	3	2	0
After 10 years	6	5	4	2	0
After 50 years	9	8	5	3	1
After 100 years	9	8	6	3	1
Steady State Spring Gain (cfs)	10	9	6	3	1